

Regulatory Monitor

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New Prevention of Money Laundering Regulations

Legal Notice 199 of 2003 came into force upon publication on 12 August 2003 and contains the new Prevention of Money Laundering Regulations which substitute the 1994 Regulations.

The most significant amendment is certainly the inclusion of a number of professions and businesses as "subject persons" namely individuals or companies who are required to comply with the Regulations in the same manner as the "traditional" subject persons such as banks, stockbrokers and insurance intermediaries. The newly regulated professions are auditors, external accountants, tax advisors, notaries, lawyers and other independent legal professionals, while the newly regulated businesses are nominee companies and licenced nominees, real estate agents, dealers in precious stones or metals or works of art or similar goods and auctioneers.

However in the case of notaries, lawyers and other legal professionals, the Regulations only apply in relation to assisting in the planning or execution of transactions for their clients concerning the (i) buying and selling of real property or business entities; (ii) managing of client money, securities or other assets, unless the activity is undertaken under a licence issued under the provisions of the Investment Services Act, (iii) opening or management of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies or similar structures; or by acting on behalf of and for their client in any financial or real estate transaction.

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Electronic Direct Marketing & Data Protection

Legal Notice 16 of 2003 entitled Processing of Personal Data (Telecommunications Sector) Regulations, 2003 was published in the Government Gazette of Malta No. 17,339 on 10/01/2003 and came into force on the 15 July 2003.

Although in the main these Regulations are addressed to telecom companies, Section 10 of the Regulations applies to everyone. The source of this provision is EU Directive 2002/58/EC of the European Parliament and Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). This Directive replaced Directive 1997/66/EC after an EU Commission study reported in January 2001 that Internet subscribers world-wide are unwittingly paying an estimated Euro 10 billion a year in connection costs just to receive "junk" e-mails.

Section 10 of the Regulations, entitled "Unsolicited communications" provides that:

(1) A person shall not use, or cause to be used, any publicly available telecommunications service to make an unsolicited communication for the purpose of direct marketing by means of -
(a) an automatic calling machine, or
(b) a facsimile machine, or
(c) electronic mail,
to a subscriber, who is a natural person, unless the subscriber has given his prior explicit consent in writing to the receipt of such a communication.

(2) Notwithstanding sub-regulation (1) of this regulation, where a person has obtained from his customers their contact details for electronic mail in relation to the sale of a product or a service, in accordance with the Data Protection Act that same person may use such details for direct marketing of its own similar products or services:

Provided that customers shall be given the opportunity to object, free of charge and in an easy and simple manner, to such use of electronic contact details when they are collected and on the occasion of each message where the customer has not initially refused such use.

(3) A person who uses or causes to be used any other means of communication other than those stated in sub-regulations (1) and (2) of this regulation for the purpose of direct marketing shall, at no charge to the subscriber, ensure that any such communications to

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In determining whether a subject person is complying with the Regulations, it is now mandatory (and not merely optional) for a court to consider any guidance given by the Financial Intelligence Analysis Unit (FIAU) with the concurrence of a supervisory authority, and failing such guidance, any other guidance issued by a body which regulates, or is representative of any trade, profession, business or employment carried on by that subject person. Indeed a new regulation gives the FIAU the power to issue procedures for any subject person and such procedures are binding as the law itself.

The concept of Know Your Customer has been further elaborated in the Regulations, which now require a subject person to be able to establish the business profile of an applicant for business. Keeping a copy of the identification document on file has now become mandatory, while previously it would have been sufficient to have enough identification details so that the ID document could be re-obtained. The identification process must be repeated if doubts have arisen or changes have occurred during the business relationship. The Regulations now also oblige subject persons to examine with special attention any complex or large transactions and any transactions which are particularly likely, by their very nature, to be related to money laundering.

When the applicant for business is a company, the old Regulations required identification of the company and its directors. The new Regulations extend identification also to all shareholders who hold 10% or more of the company's share capital. Nominees or trustees are now required to disclose the underlying beneficiary's identity to a subject person. The old Regulation 7(5) which allowed a nominee to merely assure identification has been removed. Insurance policies with respect to a pension scheme are exempt from the identification requirements provided the policy does not contain a surrender clause and may not be used as collateral for a loan.

Reporting of suspicious transactions to the FIAU is obligatory for all "old" and "new" subject persons, however there is an exemption for lawyers if the information which gives rise to suspicion is received or obtained from the client in the course of ascertaining the legal position for the client or performing their responsibility of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

Anything new in the Regulations would only apply to business relationships formed after their coming into force. However if a doubt has arisen or there have been changes in the established business relationship, the identification process must be carried out in accordance with the new Regulations. ❖

a subscriber are not sent if the subscriber requests that such communications cease:

Provided that this sub-regulation shall apply only to subscribers who are natural persons.

(4) In all cases the practice of sending electronic mail for the purposes of direct marketing, disguising or concealing the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request that such communications cease, shall be prohibited.

It should be noted that "electronic mail" means "any text, voice, sound or image message sent over a public telecommunications system which can be stored in the system or in the recipient's terminal equipment until it is collected by the recipient". Therefore, in line with the EU Directive, e-mail also includes SMS messages.

The persons protected by all of the paragraphs of Section 10 are individuals, but companies, associations, etc, have the protection of paragraphs (2) and (4). This is the first time that "corporate" data protection has been implemented, since the Data Protection Act itself only applies to individuals (see Commercial Courier, May 2002).

The net effect of Section 10 of the Regulations is that all persons would have to obtain prior explicit consent in writing from individual customers in order to send direct marketing by automatic calling machine, fax, e-mail or other electronic means such as SMS. Although the law speaks of consent "in writing", it may be argued that it would be also possible to obtain the consent electronically and this in line with the requirements of the Electronic Commerce Act which allow any requirement to have something "in writing" to be satisfied if the document is in electronic format.

If the customer's e-mail address is collected in connection with the provision of a product or service then that e-mail address can be used for direct marketing unless the customer objects. The objection may be raised at any time. This right to object applies also to non-individual entities such as companies, associations, etc.

If other means of direct marketing through communications are used (e.g. by telephone) then the person conducting the marketing must ensure that any such communications are not sent or made if the customer requests that such communications cease. This right to object, in this case only applies to individuals.

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Corrigendum

With reference to the article carried in the May 2003 issue regarding outsourcing of compliance services, CDF Advocates would like to clarify that its dedicated compliance team has, with the approval of the MFSA, already been engaged for the provision of compliance advisory/ consultancy services.

Data Protection Act now in force

The Data Protection Act, together with some related Legal Notices, came into force on the 15 July 2003. While the Act is now in force for processing which commenced on or after the 15 July 2003, the provisions of articles 7 to 9 and 12 to 17 apply as follows: (a) from the 15th April, 2004 onwards, where automated processing operations of personal data have already been initiated on the 15th July, 2003; (b) from the 24th October, 2007 onwards, where processing operations of personal data held in manual filing systems have already been initiated on the 15th July, 2003.

The Data Protection Commissioner has issued its Notification Form which has to be submitted by the 15 April 2004. The 6-page Notification Form is used to notify the Commissioner of the type of data processed, its purposes, the categories of data subject and other relevant matters.

Further information on completing the Notification Form may be obtained from CDF Advocates. ❖

New fees for financial services operators

As from the 1 January 2004, new fees will apply for companies holding licences under the various financial services laws. The details have been published in Legal Notices 214 to 221 of 2003.

The minimum fee for the registration of a new company has increased from Lm100 to Lm150, and the annual fee for licenced nominees has increased from Lm500 to Lm750.

In Investment Services, annual licence fees have increased as follows:

- Category 1a – from Lm400 to Lm500
- Category 1b – from Lm400 to Lm600
- Category 2 – from Lm600 to Lm1200
- Category 3 – from Lm1,000 to Lm1,500
- Category 4 – from Lm2,000 to Lm3,000
- Category 5 – from Lm100 to Lm120.

In the banking sector, the standard licence fee is now Lm5,000 irrespective of branches, but a new supervision fee has been introduced. The banking supervision fee is equivalent to 0.000142 of the bank's deposits as reported at the end of the previous year.

Increases in fees will also apply in the insurance sector. ❖

When the Regulations come into force it would also be illegal to send electronic mail for the purposes of direct marketing when this involves disguising or concealing the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request that such communications cease. This implies that all direct marketing e-mails must clearly state the identity of the sender, at least by his, her or its real name, and furthermore contain an "unsubscribe" statement allowing the recipient to request not to receive any more e-mail marketing.

A person who suffers any loss or damage because of any contravention of these regulations by any other person shall be entitled to take action before the competent court seeking compensation from that other person for that loss or damage. The action must be commenced within a period of twelve months from the date when the person becomes aware or could have become aware of such a contravention, which ever is the earlier.

Furthermore any person who contravenes or fails to comply with these regulations is liable to an administrative fine not exceeding one thousand liri, which fine shall be determined and imposed by the Data Protection Commissioner. Any person aggrieved by a decision taken by the Commissioner in accordance with these regulations and having a legal interest to contest such a decision may appeal to the Data Protection Appeals Tribunal.

Of course all the above will not mean that we will wake up the day after the Regulations come into force and no longer receive junk e-mail, unsolicited SMS messages and sales phone calls. What it really means is that the serious businesses in this country have to make sure that their electronic marketing methods are adapted to meet the requirements of the Regulations. With the limited time left, both for the coming into force of the Data Protection Act in general, as well as for these Regulations in particular, working on the implications of data protection has become a top agenda item. ❖

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